IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 9TH OCTOBER 2007 / 17TH ASWINA 1929

MFA.No. 20 of 2002()

AGAINST THE ORDER DATED 16/8/2001 IN ARB. IN OP.201/2000 of D.C. & SESSIONS COURT, ERNAKULAM
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APPELLANTS/PETITIONERS:
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1. IMPEX CORPORATION, 399, ST.PAULS AVENUE, JERSEY CITY, N.J.07306, UNITED STATES OF AMERICA.

2. JOSEPH PARAYIL, PRESIDENT, IMPEX CORPORATION, 399, ST.PAULS ANENUE, JERSEY CITY, N.J.07306,UNITED STATES OF AMERICA.

3. DR.THOMAS ALAPPAT, SECRETARY, IMPEX CORPORATION, 399, ST.PAULS AVENUE, JERSEY CITY, N.J.07306, UNITED STATES OF AMERICA.

BY ADV. SRI.RAJIV ABRAHAM GEORGE
SRI.EAPEN ABRAHAM GEORGE
SRI.SUNIL JACOB JOSE

RESPONDENT/RESPONDENT:

ELENJIKAL AQUAMARINE EXPORTS LTD., "SREEVALSAM", MAHAKAVI G ROAD, KARIKKAMURI, COCHIN-682 011.

BY ADV. SRI.ANIL XAVIER
SRI.ZAKEER HUSSAIN
SRI.N.MANOJ KUMAR
SMT.MANJU CHACKO

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 09/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

M.F.A.NO.20 OF 2002 ()

Dated this the 9th day of October, 2007

J U D G M E N T

KOSHY,J.

Main question to be decided in this case is the application of principles of natural justice and fair hearings in Arbitration proceedings. Appellant filed an application to set aside the award passed by the arbitrator under Section 34 of the Arbitration and Conciliation Act, 1996 (herein referred to as the 'Act'). Various contentions were raised by the appellant. First contention was that there was no proper arbitration agreement. Second contention was that the arbitrator was not properly appointed and appellant never agreed for the arbitration or arbitrator. Thirdly it was argued that former junior of the arbitrator was appearing for the claimants and therefore there are circumstances to doubt the impartiality of the arbitrator as provided under Section 12 (3) of the Act. Finally it was contended that arbitrator decided the matter ex parte and

award was passed without issuing proper notice and hence there is violation of the principles of natural justice. The District Court found all these points against the appellant in the impugned order.

2. Section 7 of the Act mandates that there should be an agreement by the parties to submit to arbitration. Section 7(2) provides that an arbitration agreement can be in the form of an arbitration clause in a contract or in the form of a separate agreement but Section 7(3) mandates that an arbitration agreement shall be in writing but Section 7(4) provides that it can be by exchange of letters etc.

Sections 7(3) and 7(4) are as follows:

> Section 7(3): An arbitration agreement shall be in writing.
>
> Section 7(4): An arbitration agreement is in writing if it is contained in -
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> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, telegrams or other means of telecommunication which

provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

As held by the Apex Court in ***Smt.Rukmanibai Gupta v. The Collector, Jabalpur and others (AIR 1981 SC 479)*** arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed to refer the dispute to arbitration. In this case, admittedly disputes arose between the parties in respect of business transactions between them. By Annexure I and II letters produced along with the petition to set aside the award show that the respondent threatened initiation of legal proceedings, allegations and breach of contract by the appellant. But the respondent graciously offered that the dispute could be settled by reference for arbitration. If appellants agree for the same, appellant was asked to select one of the 3 arbitrators mentioned in the letter. Respondent requested the petitioners to intimate their concurrence and appoint the arbitrator within 30 days. Annexure III letter dated

12.2.1998 was issued by the appellants in reply to Annexure II. It is stated categorically in Annexure III as follows:

> "If you wish to take this matter for arbitration, we are more happy to cooperate the same. We will appoint Mr. X (name is omitted by us), Advocate, Ernakulam as the Arbitrator."

In the light of the above, an unambiguous consent contained in Annexure III written in response to Annexure II, it cannot be contended that sole arbitrator was appointed without appellants consent or there is no agreement for arbitration by exchange of letters. On these facts, we are even unable to understand how a contention can be raised to the effect that there is no agreement for arbitration or the arbitrator. Therefore first two contentions raised by the appellant are untenable.

3. With regard to the third contention, according to the appellant, the advocate appearing for the claimants was a former junior. It was also contended that the arbitrator erred in not disclosing to the petitioners the fact that counsel who

appeared for the respondent was a former junior of the arbitrator. It is found by the District Court that the arbitrator had arbitrated an earlier dispute between the same parties and in that arbitration the very same junior counsel had appeared for the respondent. No objection was raised against the continuance of the arbitration in that proceedings or to the engagement of the said junior counsel by the respondent. No doubt the arbitrator must be impartial. Maxim 'Nemo judex in re sua' (No man a judge in his own cause) Nemo debut esse judex in prepria causa (No one ought to a judge in his own case) are accepted in India also. This maxim includes not only if Judge is a party to the case but also if he has an interest in the case. But the sole arbitrator has no personal interest in the matter. It is the contention of the appellant that since former junior to the arbitrator was appointed for the claimants, there is likelihood of bias or reasonable suspicion of his impartiality. Justice should be rooted in confidence. Justice should not only be done but seen to be done. It is also argued that this is under Section 12 of the Act which reads as follows:

> **Section 12: Grounds for challenge:-** (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.
>
> (2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed to them by him.
>
> (3) An arbitrator may be challenged only if -
>
> (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
>
> (b) he does not possess the qualifications agreed to by the parties.
>
> (4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

In this case advocate for the claimant was a former junior of the arbitrator. With regard to the earlier arbitration proceedings referred by respondents, it was contended that at that time appellant was not aware that the advocate was a former junior of the arbitrators. As held by the Apex Court in ***International Airport Authority of India v. K.D.Bali (AIR***

1988 SC 1099) the purity of administration requires that the party to the proceedings should not have an apprehension that the authority is biased and is likely to decide against the party. But in this case advocate was a former junior is not a ground for inferring bias. He ceased to be a junior years ago. Merely because advocate of the claimant was much earlier stands his counsel as a junior to the arbitrators is of no consequence. Such former juniors even appear against the seniors in various cases. It is true that justice should not only be done but it must appear to be done. On the facts of this case, we cannot infer any bias. Mere suspicion of bias without any materials or substance is not a ground to set aside an award. We are of the view that there is no reason to suspect the impartiality of the arbitrator merely because a former junior of the arbitrator was engaged by the claimants Hence there is no merit in contention No.3 also.

4. Finally it was contented that the arbitrator was not fair to the petitioners and he had not given them a fair opportunity to participate in the proceedings. No proper notice was issued

and there is violation of principles of natural justice. According to the appellant after receipt of Annexure III notice regarding the appointment of arbitrator, they never received any communication from the arbitrator. Copy of the claim petition filed was not forwarded to them before they were declared ex parte. They were not given any opportunity to file written statement or counter to the claims. After receipt of Annexure III, they received for the first time a communication from the arbitrator with the proceedings dated 12.11.1999 and copy of the claim petition with supporting documents filed by the claimant from the arbitrator, stating that the appellant's case is adjourned to 20.12.1999. The proceedings dated 12.11.1999 shows that appellants were declared ex parte on that date. According to the appellants they were not informed of the posting on 12.11.1999. On 20.12.1999, even though its advocate with representative of the appellants went to the arbitrator's office, arbitrator was out of station and proceedings were adjourned and adjourned date of posting was not intimated. On 3.1.2000 advocate of appellant sent a registered letter requesting the arbitrator to inform the date. In

the reply to the above, by letter dated 7.1.2000 appellants were informed that arbitration was completed and by proceedings dated 12.11.1999 the appellants were declared ex parte and the copy of the same was sent to the Appellants by registered post as well as by courier and that the arbitration proceedings scheduled on 20.12.1999 was adjourned to 3.1.2000 on which day the respondent/claimant adduced evidence and the proceedings closed and the case was reserved for award. It is submitted that even though the appellants were served with a copy of the proceedings dated 12.11.1999 posting the case to 20.12.1999, Arbitrator did not send any proceedings to the appellants herein, postponing the hearing from 20.12.1999 to 3.1.2000. That also shows that arbitration proceedings on 20.12.1999 was adjourned and there was no sitting on that day and no further notice was given. A copy of the statement of facts filed by the claimant alongwith supporting documents was also received alongwith the said proceedings dated 12.11.1999. It was only when the said proceedings dated 12.1.1999 was received by the appellants, they became aware for the first time that arbitral

proceedings had commenced, that some Fax Confirmation Report had been produced by the respondent/claimant before the Arbitrator to show that the appellants had received notice issued by the Arbitral Tribunal, that the appellants were declared ex parte and that the next arbitration sitting would be held on 20.12.1999. The very fact that a copy of the Statement of claims of the respondent/claimant along with supporting documents was sent along with proceedings dated 12.11.1999 would clearly show that no attempt had been made prior to that by the Arbitrator or the respondent to serve a copy of the statement of claims along with supporting documents on the appellants. It is their contention before they were declared ex parte, they never received any communication from the arbitrator regarding the date of posting earlier. Without issuing notice they cannot be declared ex parte. No evidence was adduced by the respondent or arbitrator to the effect that arbitrator issued notice of posting of the case to the appellant before the date of posting on 12.11.1999 or before appellants were declared ex parte. It is also not disputed that appellants were intimated that case posted on 20.12.1999.

But case was adjourned to 3.1.2000 as arbitrator was out of station. Admittedly appellants were not informed of the date of posting on 3.1.2000. No A Diary or B Diary is kept like Civil case. Notice was also not given intimating that arbitration case posted on 20.12.1999 was postponed to 3.1.2000. Explanation of the respondent is that it was not necessary to send such notice as appellants were already declared ex parte on 12.11.1999. Here the appellants were not given a fair opportunity to present and contest the matter. The proceedings of 12.11.1999 was send to the appellants by the arbitrator alongwith statements of claims indicating that even the statement of claims was not forwarded to the appellants before they were declared ex parte. The proceedings of the arbitrator cannot be equivalent to the proceedings in a civil court. The Code of Civil Procedure as such is not applicable before the arbitrator. Since no procedure is contemplated in the arbitration agreement, the Arbitral Tribunal can adopt the proceedings in the manner it considers appropriate. But the proceedings adopted shall be in fair and in accordance with the principles of natural justice. Arbitrator also cannot violate

the provisions of the Act.

5. Now we will consider some of the relevant portions of Section 18 regarding the proceedings to be adopted by the arbitrator.

> **"Section 18. Equal treatment of parties:-** The parties shall be treated with equality and each party shall be given a full opportunity to present his case."

It shows that though arbitrator is not bound by technical rules of procedure, he cannot ignore basic principles of natural justice. Thread of natural justice should run through the entire arbitration proceedings and the principles of natural justice require that sufficient notice of posting shall be given to both sides and equal opportunities shall be given to both sides to prosecute the case and that the arbitral tribunal is not bound by technical rules of C.P.C. Section 19 reads as follows:

> **Section 19. Determination of rules of procedure:-** (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (V of 1908) or the Indian Evidence Act, 1872 (1 of 1872)

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Section 24 of the Act also deals with hearings and written proceedings. Section 24 reads as follows:

Section 24: Hearing and written proceedings: (1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

> (3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."

It shows that sufficient advance notice must be given regarding dates of oral hearng and inspection of documents and pleadings filed by one party shall be communicated to the other party. Admittedly even the claim statement was given on the appellants after they were declared ex parte and thereafter no notice was send on the appellants.

6. It is also not correct to hold that if one of the parties declared ex parte, it cannot appear before the arbitrator in further proceedings or that may not entitle to any further notice of hearing. In Law and Practice of Commercial Arbitration in England by Mustill and Boyd (1982 Ed. p.261) the principles of fair hearing to be adopted by the arbitrator is stated as follows:

> 1. Each party must have a full opportunity to present his own case to the tribunal.

2. Each party must be aware of his opponent's case, and must be given a full opportunity to test and rebut it.

3. The parties must be treated alike. Each must have the same opportunity to put forward his own case, and to test that of the opponent.

With regard to oral hearing it is stated at pages 263-64 as follows:

1. Each party must have notice that the hearing is to take place.

2. Each party must have a reasonable opportunity to be present at the hearing together with his advisers and witnesses.

3. Each party must have the opportunity to be present throughout the hearing.

4. Each party must have a reasonable opportunity to present evidence and arguments in support of his own case.

5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral arguments.

6. The hearing must, unless the contrary is expresly agreed, be the occasion on which the parties present the whole of their evidence and arguments.

With regard to ex parte procedure, Arbitral tribunal is not bound by provisions in C.P.C. but by Section 25 of the Act dealing with the situations when parties is absent on the date of hearing.

Section 25. Default of a party:- Unless otherwise agreed by the parties, without showing sufficient cause, -

> (a) the claimant fails to communicate his statement of claim i accordance with sub-section (1) of Section 23, the arbitral tribunal shall terminate the proceedings;
>
> (b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of Section 23, the arbitral tribunal shall continue the proceedings without treating the failure in itself as an admission of the allegations by the claimant;
>
> (c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and made the arbitral award on the evidence before it.

Article 25 of the UNCITRAL Model Law is incorporated in Section 25. Russel on arbitration, 20th Edition at page 263, it is stated as follows:

> "In general, an arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties o their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside."

This principle adopted by Calcutta court in ***Juggilal Kamlapat v. General Fibre Dealers Ltd. (AIR 1955 Cal. 354 (DB))*** held that if a party fails to attend the arbitration hearing on the due date and time, the arbitrator is at liberty to proceed ex parte, though it is advisable, but not compulsory, that he should give that party notice of his intention to proceed ex parte, if he is absent in the next hearing. Once an arbitrator makes known his intentions to proceed ex parte and it is duly noted by the parties, the act of a party in not putting up an appearance on the next date fixed, would empower the arbitrator to proceed ex parte and such an act of the arbitrator does not amount to misconduct as held in ***Dalmia Cement (Bharat) Ltd. v. Advance Commercial Co. Ltd., (1955 (1) Arb LR 278 (Del))***. Since provisions of CPC is not strictly applicable in arbitration proceedings, even if one party is absent and arbitral tribunal declared him ex parte, if the case is

not finished on that day and the case is only adjourned without deciding the case, both sides can appear in the next adjournment date. The meaning of the expression 'ex parte' has been considered by the Supreme Court in ***Sangram Singh v. Election Tribunal, Kotah (AIR 1955 SC 425 at 431)***. Referring to the judgment of ***Wallace, J. in Venkatasubbiah v. Lakshminarasimham (AIR 1925 Mad. 1274)***, the Apex Court opined that 'ex parte' only means in the absence of other party. In an ex parte proceedings, the court can proceed with the case if one party is absent without sufficient cause and due notice, as if that party is present. If an ex parte decision is taken, when one party is absent without sufficient reasons, decisions will be valid. But if no ex parte decision is taken on that date but case is further adjourned, both sides can participate in the subsequent date of posting as held by this Court in ***St.Joseph's Hospital v. Jimmy (2001 (2) KLT 514)***. The proceedings under C.P.C. is not applicable to other proceedings unless C.P.C. is made applicable by express provisions. This Court has considered Consumer Protection Act and Rules made therein held as follows:

"If an ex parte decision is taken, the opposite party can only file an appeal. In the present case no ex parte decision is taken. Therefore, in subsequent postings opposite party is free to attend and continue with the proceedings. I also note that date of posting was 14.4.1999. But on that day there was no sitting. Therefore the opposite party honestly thought that the next date of posting will be intimated and therefore he awaited notice. Since no notice was received, he enquired on 20.4.1999 and on seeing that he has been declared ex parte after posting the case on 16.4.1999. Ext.P3 petitoin was filed. There is sufficient reason also for non-appearance as the petitioner a lawman was not aware of the usual procedure adopted by the Forum, when the posting date in the notice was declared as a holiday.

I may also refer to the decision of the Supreme Court in ***New India Assurance Co.Ltd. v. R.Srinivasan ((200) 3 SCC 242)***. There the Supreme Court held that the Consumer Disputes Redressal Forum concerned has inherent power and jurisdiction to restore the complaint dismissed for default provided the complainant shows good reasons for non-appearance. In the absence of powers under Order 9 of C.P.C., I am of the opinion that, if inherent power is applicable in the matter of restoration of a dismissed complaint for defaut, same power also can be exercised when an ex parte decision is also taken in the interest of justice. In any event, in this matter, since no ex parte decision is taken, I am of the opinion that the petitioner will be free to attend the case on subsequent dates of hearing. Therefore, no further orders are necessary in this Original Petition. Petitioner is free to attend the proceedings, cross examine the witness, adduce evidence of his defence etc. in the subsequent postings.

The word 'ex parte' was considered by the court in ***F.A.C.T. Employees Association v. F.A.C.T. Ltd. (1976 KLT 474)*** on the basic ground of Rule 22 of the Kerala Industrial Tribunal Rules. Justice Kochu Thommen observed as follows:

> "The Tribunal may imagine that the absentee is present, and having done so, it may give full effect to its imagination and carry it to its logical conclusion. The Tribunal has to bear in mind the purposes for which the fiction is created and has to give effect to them. Obviously the intention of R.22 is to enable the Tribunal to imagine that a person is present, although he is in fact absent; and to further imagine that, although present, he is unwilling to adduce evidence or argue his case."

Therefore even if appellants were absent on 12.11.1999 and the matter was adjourned to 20.12.1999, appellants ought to have been allowed to participate in that proceedings. In fact notice of posting on 20.12.1999 was issued to them for that purpose. But admittedly, there was no sitting on 20.12.1999 and matter was adjourned to 3.1.2000 without any notice. On the facts of the case, no proper and sufficient notice was given to appellants by arbitrator before they were declared ex parte

or thereafter. Even the copy of the claim was forwarded to the appellant only after he was declared ex parte. No notice at all was given for the posting on 3.1.2000. The date of posting was not intimated when the case was adjourned from 20.12.1999 as there was no sitting on that date which was the only date informed to the appellant. Hence there is violation of principles of natural justice and these are violation of Section 18 and 25.

7. Section 34(2) (iii) of the Act reads as follows:

> (2) An arbitral award may be set aside by the Court only if-
>
> xxx xxx xxx
>
> (iii). the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

The above provision is based in Article 34 of the UNCITRL Report on Adoption of Model Law. Here copy of the claim

statement was not get to the appellants before he was declared ex parte. No notice of posting of the case was given before he was declared ex parte. When appellants were intimated the date of hearing, he was already declared ex parte and on the date there was no sitting and case was adjourned. Adjourned date was also not intimated. All these facts show that principles of natural justice were violated and opportunity of fair hearing was denied. It is fundamental to fair proceedings that both sides should be heard. The basic principle 'audi alteram partem' ('Hear the other side') is accepted by all civilized counter ***(See Ridge v. Baldwin (1964 AC 40))***. In ***O'Reilly v. Mackman (1983 2 AC 237)*** Lord Diplock said in the House of Lords that the right of a man to be given 'a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement'. In ***Suresh Chandra Nanhorya v. Rajendra Rajak and others ((2006) 7 SCC 800)*** Apex Court held as

follows:

"8. Natural Justice is an inseparable ingredient of fairness and reasonableness. It is even said that the principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary.

9. In the celebrated case of *Cooper v. Wandsworth Board of Works* the principle was thus stated: (ER p.420)

> "[E]ven God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that 'thou shouldest not eat?"

10. Since then the principle has been chiselled, honed and refined, enriching its content. In *Malloch v. Aberdeen Corp.* it was stated: (All ER p. 1279e)

> "The right of a man to be heard in his own defence was the most elementary protection....."

11. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of

justice."

This principle is incorporated in Section 18 and 24 of the Arbitration Act. Here in this case appellant was denied the right of fair hearing.

24. Apart from the violation of basic principles of natural justice, there is violation of statutory provisions covered in Sections 18 and 24 of the Act. It is true that under the 1996 Act court has only a limited power to interfere in the arbitration awarded only on the grounds specified in Section 34. Here impugned arbitration award is liable to be set aside under Section 34(2)(iii). Accordingly we set aside the award only for violation of principles of natural justice and not on merit. The matter has to be decided denovo. It is submitted that in view of the allegations raised, parties agreed for appointment of a new arbitrator. Counsel for both sides submitted that the matter can be decided by a sole arbitrator. After discussions they submitted that both sides agreed the name of Justice Mr.T.V.Ramakrishnan, former Judge of this Court as the sole arbitrator to proceed with the arbitration afresh. Parties may

furnish a copy of the judgment to Justice.Mr.T.V.Ramakrishnan to proceed further with the Arbitration. Since claim petition is already filed and copy was send, appellant shall file the counter statement with supporting documents within one month from the date of receipt of the copy of the judgment as allowed by the sole arbitrator and sole arbitrator is free to adopt fair procedure as contemplated under Section 19 of the Act. Appeal is allowed to the above extent. We make it clear that with regard to the merits of the disputes, we have not expressed any opinion and it is left to the decision of the sole arbitrator. Parties to bear their respective costs in the appeal.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

M.F.A.NO.20 OF 2002 ()

J U D G M E N T

9th October, 2007